Supreme Court, U.S.
F I L E D
JUN 10 1998
CLERK

No. 97-1837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CHAPARRAL STEEL COMPANY
Petitioner,

vs.

STATE OF TEXAS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH COURT OF APPEALS FOR
THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant
Attorney General

DAVID A. TALBOT, JR.
Deputy Attorney General
for Litigation

KAREN W. KORNELL
Assistant Attorney General
Chief, Natural Resources
Division

JEFFEE L. MARTINEZ-VARGAS*
Assistant Attorney General

DOUGLAS BURT FRASER
Assistant Attorney General

Natural Resources Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2549
Tele. No (512) 463-2012
Fax No. (512) 320-0911

*Counsel of Record

June, 1998

QUESTION PRESENTED

Whether Texas is preempted from enforcing its railroad clearance statute governing distances between railroad tracks and adjacent structures by virtue of a prior settlement agreement between an employer and the Department of Labor based on a violation of the general duty clause of the Occupational Safety and Health Act.

TABLE OF CONTENTS

Page (s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES . . . . . iii - iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS WHY THE PETITION SHOULD BE DENIED . . . 5

A. Employers' incentive to cooperate with, participate in and reach settlements after federal OSHA investigations will not be affected by this decision . . . 5

B. The Tenth Court of Appeals' decision will not have a substantial impact on issues already regulated by federal occupational safety and health standards 7

C. There is no evidence of Congressional intent to preempt the Clearance law 8

D. Approval of the Clearance law by the Secretary is not required under the reasoning of *Gade* 10

E. There is no confusion in this case regarding the majority opinion in *Gade* 12

F. The Texas Court of Appeals' Opinion does not conflict with this Court's majority analysis in *Gade* . 13

TABLE OF CONTENTS
CONTINUED

Page (s)

CONCLUSION 14

APPENDIX

A. Occupational Safety and Health Act, 29 U.S.C. §655 . . . . . 1a

B. Texas Railroad Commission, Memorandum regarding employee fatality investigation, dated December 9, 1991 . . . . . 10a

C. Texas Railroad Commission, Final Order in Docket No. 0003699ZZCL, dated February 28, 1995 . . . . . 15a

TABLE OF AUTHORITIES

Authorities	Page(s)
Brennan v. Butler Lime and Cement Co., 520 F.2d 1011 (7th Cir. 1975)	10
Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302 (1988)	8
Florida Lime & Avocado Growers, Inc., 373 U.S. 132, 83 S.Ct. 1210 (1963)	8
Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S.Ct. 2374 (1992)	8, 9, 10, 12, 13
Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305 (1977)	8
Pratt & Whitney Aircraft, Div. of United Technologies Corp, v. Secretary of Labor 649 F.2d 96, 98 (2d Cir. 1981)	10
Puffer's Hardware, Inc. v. Donovan, 742 F.2d 12 (1st Cir. 1984)	12
Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146 (1947)	8

U.S. CONSTITUTION

U.S. Const. Art. VI, cl.2 ..... 2, 8

FEDERAL STATUTES

29 C.F.R. §1910.145(c)(3) 2, 3, 7
29 U.S.C. §654 (West 1985) 2, 3
29 U.S.C. §655 (West 1985) 2
29 U.S.C. §657 (West 1985) 2
29 U.S.C. §665 (West 1985) 9
29 U.S.C. §667(a) (West 1985) 9, 13
29 U.S.C. §667(b) (West 1985) 9, 11

TABLE OF AUTHORITIES
CONTINUED

TEXAS STATUTES

Authorities — Page(s)

TEX. REV. CIV. STAT. ANN. (West 1926)
- Arts. 6559a-f 2
- Art. 6559b 3
- Art. 6559e 5
- Art. 6559f 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-1837

CHAPARRAL STEEL COMPANY
Petitioner,

vs.

STATE OF TEXAS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH COURT OF APPEALS FOR
THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of Texas, by and through its attorney, the Attorney General of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by Chaparral Steel Company ("Chaparral"), seeking review of an unreported state-court opinion entitled *State of Texas v. Chaparral Steel Company* from the Tenth Court of Appeals for the State of Texas.[1] Chaparral's petition for review by the Texas Supreme Court was denied.

---

[1] Respondent State cites to statements in Chaparral's Petition as "Pet. at ___" and items contained in the appendix to the Petition as "Pet. App. at ____a." Cites to the appendix in this brief in opposition will be to "App.__ at ____a."

Constitutional and Statutory Provisions Involved

The Supremacy Clause contained in Article VI of the U.S. Constitution is involved in this case concerning federal preemption of state law. The relevant federal statutory provisions are 29 U.S.C. §§ 654, 655, and 657 of the Occupational Safety and Health Act and 29 C.F.R. 1910.145(c)(3).

The relevant state statutory provision is the Texas Clearance Act, contained in Texas Revised Civil Statutes, articles 6559a-f. The federal and state provisions, except for 29 U.S.C. §655 are reproduced in Chaparral's petition, App. D-F Pet. App. at 12a-29a. Section 655 of the OSH Act is set out in this brief as Appendix A. App. at 1a-9a.

Statement of the Case

On November 9, 1991, a Chaparral employee was crushed to death between a train and a retaining wall on the premises of the Chaparral plant. An investigation by the Texas Railroad Commission ("Commission") was initiated when the Commission was contacted by an investigator of the Occupational Safety & Health Administration ("OSHA") and informed that inadequate clearance may have been a contributing cause of a fatal accident. App. B at 10a. The Texas Railroad Clearance statute ("Clearance law") requires certain minimum distances between tracks and adjacent and overhead structures. TEX. REV. CIV. STAT. ANN. arts. 6559a-f (West 1926). The OSHA investigator invited the Commission to review OSHA's preliminary accident investigation findings and participate in a meeting with Chaparral officials on November 25, 1991. Measurements taken on that date revealed clearances from the retaining wall to the centerline of the track between 5'8" and 5'11". The Clearance law requires a minimum horizontal

distance of eight and one half feet. TEX. REV. CIV. STAT. ANN. arts. 6559b. Commission inspectors attempted to schedule an inspection of the entire plant but were prevented access by Chaparral's attorney. App. B at 11a.

The State filed a lawsuit against Chaparral on January 15, 1993[2], seeking penalties for Chaparral's failure to comply with the provisions of the clearance law. On May 14, 1993, the state filed a request for production of documents and for inspection of premises. The Commission inspectors were allowed access to the premises on July 28, 1993, and completed an inspection report identifying eleven violations of the Clearance law throughout the Chaparral plant.

Meanwhile, OSHA issued a citation based on inspections that occurred between November 12, 1991, and March 3, 1992. The citation described the violation as follows: "At the West end of the retaining wall used for alloy storage. No warning sign was posted to instruct employees of hazard of being caught between moving box cars and the retaining wall." *Id.* The citation listed the "Standard, Regulation or Section of the Act Violated" as follows: "29 C.F.R. §1910.145(c)(3)[3]: Safety instruction sign(s) were not used where there was a need for general instructions and suggestions relative to safety measure(s)." *Id.* The Department of Labor and Chaparral subsequently agreed to a settlement of this citation as a violation of the general duty clause[4] of the Occupational Safety and Health Act ("OSH Act"). The settlement agreement dated April 14, 1993, states:

---

[2] Chaparral erroneously states on page 4 of its petition that the State's lawsuit was filed on September 23, 1993. Pet. at 4.

[3] 29 C.F.R.§1910.145(c)(3) is reproduced in Petitioner's Appendix F. Pet. App. at 23a-29a.

[4] 29 U.S.C. §654.

> The employer did not furnish employment and a safe place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the following: a. The employer did not instruct employees on the recognized hazard which existed in the area located at the loading dock west of the melt shop on or about November 11, 1991.

Pet. App. at 35a-37a. Chaparral agreed to pay $5,000 in addition to implementing an "absolute work rule," training employees concerning similar hazards, and installing warning signs.

A description of the proceedings below is contained in Chaparral's petition. Pet. 6-8.

Summary of the Argument

The Clearance law provides that areas around railroad tracks must be clear of obstacles within minimum horizontal and vertical distances of the tracks. Chaparral argues that by enactment of the OSH Act the federal government has nullified the State's power to enforce time-honored law. However, pursuant to the clear language of the OSH Act, the states are not preempted unless the Secretary of Labor ("Secretary") has promulgated standards on the particular subject at issue. Chaparral cannot cite any promulgated standard regarding railroad clearances, or any other indicia of Congressional intent to preempt the Clearance law. Until OSHA or some other federal agency promulgates rules for railroad clearances, the state is free to make and enforce laws on this issue.

Reasons Why the Petition Should be Denied

A. Employers' incentive to cooperate with, participate in and reach settlements after federal OSHA investigations will not be affected by this decision.

The unreported decision by the Texas Tenth Court of Appeals is unlikely to have a widespread effect on employers across the nation. More importantly, employers have sufficient incentive to cooperate with federal OSHA investigations and reach settlements with or without further judicial clarification on preemption. The more realistic danger is that under Chaparral's theory of "settlement as a standard," employers who violate state laws would be encouraged to negotiate settlement agreements with OSHA under the general duty clause for relatively small sums as a means of gaining immunity against state law enforcement of specific standards. Such a circumvention of state police powers cannot be assumed as the intent of Congress.

The allegation that a twenty million dollar windfall to the State might occur is an inaccurate and irrelevant characterization of fines and penalties set by the Texas Legislature. Pet. at 16. Civil fines and penalties are not windfalls, but a mode of punishing lawbreakers as old as law itself. The possibility that a fact finder may determine that Chaparral's violations are so egregious as to warrant the maximum penalty is irrelevant to whether the State's enforcement of this law is a proper exercise of its authority.

The Clearance law provides for penalties of not less than $100 nor more than $1,000 per violation calculated per day of each violation. TEX. REV. CIV. STAT. ANN. art. 6559e. In responses to requests for admissions, Chaparral admitted to distances that violate the Clearance law during particular time periods including up to the date of the admissions. Multiplying the number of days for each of Chaparral's admitted violations

by $100, then, by $1,000, yields a range of $312,000 to $20,340,000. The fact finder could assess penalties in any amount within this range.

Chaparral's suggestion that the Commission combed its statutes for stale laws to enforce is erroneous. Pet. at 16. While no appellate decisions from years past have been found on the subject of enforcing the Clearance law, the Commission has regulated companies with railroad tracks continuously under the Clearance law since its effective date in 1926. Companies routinely comply voluntarily by requesting deviations under article 6559f [5] of the clearance statute whenever their operations fail to comply with the letter of the law. By final order of the Railroad Commission, deviations are granted on the condition that certain compensatory safety measures are implemented.[6] The fact that clearance issues are handled administratively rather than judicially is indicative of the widespread acceptance of this law by Texas industry.

Neither the citation issued by OSHA nor the settlement agreement between the Department of Labor and Chaparral make any mention of a clearance standard or even raise the issue of improper clearances. In addition, it was an OSHA employee who notified the Commission of the possible clearance violation and invited the state inspectors to review his preliminary investigation findings and participate in a meeting with Chaparral

---

[5] It is further provided that upon application regularly made and filed, and after notice to the Attorney General, the Railroad Commission may, for good cause shown, permit any railway company or other corporation, firm, partnership, or person, or any county or municipality to deviate from the terms of this Act in accordance with an order of the Commission made and entered. . . .

TEX. REV. CIV. STAT. ANN. art. 6559f. [Entire text reproduced in Pet. App. at 15a.]

[6] An example of an order requesting a deviation from the Clearance provisions is contained in Appendix C.

officials. App. B at 10a. There is absolutely no showing that OSHA believed its jurisdiction was exclusive in this situation or that it had any standards concerning clearances that had been violated.

Moreover, to the extent that OSHA "regulated" anything at all, it is only in the area where the employee was killed. The OSHA citation and settlement involve no other part of the Chaparral plant. In its lawsuit, the State is addressing eleven violations of the Clearance law, only one of which was involved in the accident on November 9, 1991.

B. The Tenth Court of Appeals' decision will not have a substantial impact on issues already regulated by federal occupational safety and health standards.

The decision that the Clearance law is not preempted by the OSH Act will have no effect on federal occupational safety and health standards in the field of railroad clearances because no standards on the issue of track clearances have been promulgated by the Secretary. Chaparral obfuscates the issue by stating that OSHA determined that any hazard created by inadequate clearance between Chaparral's retaining wall and its rail tracks was regulated by the safety instruction sign standard in 29 C.F.R. §1910.145(c)(3). Pet. at 15-16. Neither the citation nor the settlement agreement evidence such a determination and the facts concerning the investigation indicate that OSHA believed the Commission regulated track clearances.

Chaparral complains that the Clearance law is a blunt, heavy-handed, and wasteful vehicle for achieving a safe workplace, and that OSHA possesses the expertise and the authority to implement appropriate remedies to achieve the goal of workplace safety. Pet. at 13. OSHA, however, has not implemented standards relating to track clearances. It is reasonable to assume that OSHA, by virtue of its expertise, has not promulgated clearance standards because it has determined

that the states are in a better position to regulate this particular hazard. The fact that OSHA employees called the Commission to investigate conditions at the Chaparral plant manifests approval of the Clearance law and the Commission's enforcement of this issue.

C. There is no evidence of Congressional intent to preempt the Clearance law.

Under the Supremacy Clause, any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield. *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307 (1988). Preemption will not lie, however, unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947).

Thus, whether or not a certain state action is preempted by federal law is a question of congressional intent. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 112 S.Ct. 2374 (1992). Congress can supersede state laws in three ways. First, Congress can expressly state that the particular federal law preempts state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977). Second, Congressional intent to preempt can be implied where the scheme of federal preemption is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. This is called field preemption. *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152. Third, the implication that Congress intended to preempt state law is found where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. This is referred to as conflict preemption. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218 (1963).

Congressional intent concerning preemption is expressed clearly in the OSH Act as follows:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue *with respect to which no standard is in effect under section 655* of this title.

29 U.S.C. § 667(a) (West 1985) (emphasis added). In *Gade*, this Court characterized section 667(a) as a savings clause, which saves from preemption any state law regulation of an occupational safety and health issue with respect to which no federal standard is in effect. *Gade*, 505 U.S. at 99, 112 S.Ct. at 2384. Congress anticipated that OSHA would not create standards on every single workplace hazard and allowed the states freedom to legislate where no federal standards promulgated under section 655 exist. Section 655 of the OSH Act describes the procedures for promulgation by the Secretary. 29 U.S.C. § 665. App. A at 1a.

Chaparral cannot identify a standard promulgated by the Secretary on the issue of railroad clearance. Instead, it contends that a settlement agreement between itself and the Department of Labor is a standard. In relying on the fruit of administrative negotiation, rather than a promulgated regulation, Chaparral's contention reflects a fundamental misunderstanding of the differences between the rulemaking and adjudicative processes in administrative law. Chaparral's line of reasoning amounts to an argument that since OSHA *did something*, the State's laws are preempted.

Not only is a settlement agreement not a standard, but also, the settlement was based on a violation of §654, the general duty clause of the OSH Act, which provides that an employer shall keep a safe workplace. The general duty clause is not a standard in effect under §655; it is not a preemptive standard but

rather a provision to fall back on where *no promulgated standards apply*. *Brennan v. Butler Lime and Cement Co.*, 520 F.2d 1011, 1017-18 n.9 (7th Cir. 1975). In regard to the general duty clause, the Fifth Circuit has recently stated:

> It is well-settled that the Secretary has essentially two weapons in its arsenal of enforcement. First, the Secretary may issue a citation for violations of specific standards promulgated (through rulemaking) by the Secretary. Alternatively, where the Secretary has not promulgated standards, he may rely on the General Duty Clause as a "catchall provision."

Reich v. Arcadian Corp., 110 F.3d 1192, 1196 (5th Cir. 1997), citing *Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96, 98 (2d Cir. 1981). The general duty clause is not a standard promulgated by the Secretary under §655.

D. Approval of the Clearance law by the Secretary is not required under the reasoning of *Gade*.

The vehicle for Chaparral's erroneous contention that the State was required to obtain the Secretary's approval of the Clearance law under the reasoning of *Gade* is its mischaracterization of the general duty clause as a promulgated standard.

At issue in *Gade* were OSHA regulations entitled "Hazardous Waste Operations in Emergency Response," which were specific requirements for dealing with the dangers associated with hazardous waste. Similarly, the State of Illinois had enacted laws concerning specific requirements for the training, testing, and licensing of hazardous waste site workers. The state plan was extensive, thoroughly developed, and

subjected employers and employees to an additional set of standards. The Court found that the state laws were duplicative of the federal regulations, and held that if the state had wanted to regulate its hazardous waste workers with standards other than those promulgated by OSHA, approval from the Secretary should have been sought under § 667(b), which requires:

> Any State, which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a *Federal standard has been promulgated under section 655* of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (emphasis added).

Nothing similar is at issue in this case. The state clearance law requires minimal distances from the center line of the track and other structures, while the OSH Act's general duty clause requires employers to provide a generally safe workplace. No duplicative or inconsistent regulation exists; the Clearance law does not supplement federal standards concerning track clearances. The State has issued standards where none exist in federal law. As noted by the Texas Court of Appeals in the instant case,

> If Chaparral had complied with the [Clearance law] Act, the hazardous condition would not have existed to trigger a citation for violating the general duty an employer has to maintain a safe working environment.

Pet. App. at 8a.

Gade does not address the general duty clause. Whether the general duty clause preempted state law was an issue in *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12 (1st Cir. 1984). In *Puffer's*, OSHA held that the employer and owner of a hardware store had committed a serious violation of the general duty clause when he failed to install electronically interlocked gates on the freight elevator and on the openings to the shaft, a feasible safety measure. The employer contended that state law requiring such measures exempted his building and that his compliance with applicable state law provided a complete defense. The administrative law judge rejected the defense, ruling that the OSH Act preempted the state law. Upon appeal, the reviewing court held that the state law was *not* preempted, noting an absence of conflict. Since no federal standard governed elevator safety, the state statute on the issue was not preempted. The court held, nevertheless, that the employer violated the general duty clause, recognizing that state regulation of a safety hazard and the general duty clause can co-exist and regulate the same condition.

E. There is no confusion in this case regarding the majority opinion in *Gade*.

Chaparral complains that the confusion created by the differences of the justices on the issue of preemption analysis, implied versus express, has caused the lower courts to overlook the "scope" of OSH Act preemption adopted by the Court in *Gade*. Chaparral complains that courts, such as the Texas Court of Appeals, have and will fall prey to this confusion. Pet. at 9.

The Texas Court of Appeals was not confused. The scope of the OSH Act is not so great as to preempt the Clearance law contrary to an express savings clause. Section 667(a) of the act clearly leaves the way open for state regulations regarding any occupational safety or health issue *with respect to which no standard has been promulgated by the*

Secretary. Since there has been no federal standard promulgated on the issue of railroad clearance, the states are specifically and expressly authorized to legislate.

Chaparral asks the Court to hold that the general duty clause was intended to occupy the entire field of occupational safety and health issues, in the face of clear, express language to the contrary. If such were the case, Congress would not have, in the same act, expressly permitted states to legislate where no standards exist. 29 U.S.C. §667(a). As the Texas Court of Appeals pointed out,

> Indeed, it would not make sense for the general duty clause to supersede all specific standards enacted by state authorities to encourage the kind of workplace that OSHA regulations were attempting to ensure.

Pet. App. at 8a.

Only Chaparral is confused as to the application of *Gade*. The case does not apply to the facts of this case because there is no applicable federal standard. The general duty clause is not a standard and the State of Texas does not need to obtain approval from the Secretary when a standard does not exist.

F. The Texas Court of Appeals' Opinion does not conflict with this Court's majority analysis in *Gade*.

Chaparral contends that the opinion of the Texas Court of Appeals *implies* that the court determined that preemption could not apply because the Clearance law is a general state statute with only an incidental effect on federal workplace regulations. Pet. at 12. Chaparral's analysis assumes that the Texas Court of Appeals upheld the Clearance law despite the existence of a federal standard because the Clearance law is generally applicable to tracks, not specifically to those at

workplaces. On the basis of this assumption, Chaparral argues that such an analysis would have been improper because this Court has stated that a statute should be analyzed by its impact rather than the professed purpose. Pet. 12-13.

Nothing in the Texas court's opinion, however, is even faintly suggestive of this line of reasoning. The Texas court simply found that there was no federal standard in effect that would preempt the Clearance law, whatever its impact and professed purpose. A standard is a rule that must be promulgated by the Secretary pursuant to section 655 of the OSH Act. The fruit of administrative resolution of a citation after negotiation between a single employer and the Department of Labor is not a standard.

Conclusion

For these reasons, the State of Texas requests that Chaparral's Petition for Writ of Certiorari be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID A. TALBOT, JR.
Deputy Attorney General for Litigation

KAREN W. KORNELL
Assistant Attorney General
Chief, Natural Resources Division

JEFFEE L. MARTINEZ-VARGAS*
Assistant Attorney General

DOUGLAS BURT FRASER
Assistant Attorney General

Natural Resources Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2549
Tele. No. (512) 463-2012
Fax No. (512) 320-0911

*Counsel of Record

June, 1998

APPENDIX

APPENDIX A

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 15 OCCUPATIONAL SAFETY AND HEALTH

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing

organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within

thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health

and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6) (A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and

improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprized of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the

Secretary shall, at the same time publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate

and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the

court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

APPENDIX B

OFFICE OF RAILROAD COMMISSION OF TEXAS

LENA GUERRO, Chairman
JAMES E. (JIM) NUGENT, Commissioner
ROBERT KRUEGER, Commissioner
JERRY L. MARTIN, Director
(512) 463-7122
FAX (512) 463-7153
1701 N. CONGRESS
TRANSPORTATION/GAS UTILITIES DIVISION
CAPITOL STATION - P.O. BOX 12967
AUSTIN, TEXAS 78711-2967

MEMORANDUM

TO: Mike Calhoun

FROM: Robert Pedersen

DATE: December 9, 1991

SUBJECT: Employee Fatality Investigation

The attached employee fatality investigation report was prepared in response to an accident occurring November 9, 1991, at the Chaparral Steel facility in Midlothian, Texas. The deceased, Mr. Charles E. Schindler, was fatally injured when pinned between a retaining wall and a box car during a railroad switching operation within the confines of the plant. The investigation was conducted to determine whether failure to comply with the Texas Clearance Law was a factor in the fatal accident.

Commission rail safety inspectors conduct Clearance Law inspections incidental to regular inspection activities or in response to complaints. This investigation was initiated when Mike Calhoun was contacted by the Occupational Safety & Health Administration (OSHA) and informed that inadequate clearance may have been a contributing cause of a fatal accident. Mr. C.E. Moore, an investigator with OSHA, invited the Commission to review OSHA's preliminary accident

investigation findings and participate in a meeting with Chaparral Officials on November 25, 1991.

Measurements taken November 25, 1991, at the location where the accident occurred, revealed that the structure involved in the accident and an adjacent loading dock were in violation of the Texas Clearance Law. The extent of the clearance impairment is recorded in the attached accident report. I was unable to document the inspection with photographs on November 25, 1991, so I planned to conduct a subsequent clearance inspection of the accident site and other areas within the plant for compliance with the Texas Clearance Law. When I attempted to schedule the plant inspection, I was denied access to the property by Mr. Steven McCowan, an attorney representing Chaparral Steel.

Information contained in the employee fatality investigation report was obtained from OSHA, Chaparral Steel employees and records, inspection of the accident site and public records.

EMPLOYEE FATALITY INVESTIGATION

Company: Chaparral Steel

Location: 300 Ward Road, Midlothian, Texas

Date, Time: November 9, 1991; 4:30 p.m.

Probable Cause: Injuries experienced due to being pinned between retaining wall and railroad box car.

Employee:
Name.....Charles E. Schindler
Occupation .....Switchman
Age .....34 years
Length of Service.....7 years 2 months

Description of Accident Site

At the accident site, a railroad track runs west to east with a loading dock parallel to the track on the south side. From the west end of the loading dock a retaining wall was constructed to form part of a holding area for the storage of alloys. The retaining wall is a concrete bridge truss in the shape of an I-beam. Its dimensions are approximately 17'3½" (length) x 72" (height) x 10" (width) at its widest part.

On the north side of the retaining wall (between the wall and the railroad tracks) steel braces have been placed to support the retaining wall. The braces are at approximately 15° angles leaning away from the tracks. The top of the braces are attached to the wall, with the bottom of the brace extending approximately 10 inches from the base of the wall and anchored to a concrete slab. The range of vision in this area is not obstructed. The dock and tracks were constructed in 1975, the retaining wall was completed (in house) October 9, 1991.

The Accident

Rail cars are received by Chaparral from the Atchison, Topeka and Santa Fe Railroad. All switching operations within the confines of company property are performed by Chaparral employees. On the day of the accident, the deceased, Mr. Charles E. Schindler, was working as a switchman. Other members of the crew included locomotive operator Mr. Clarence Finley, trainee Claude Garrett and operator Bobby Nix. All members of the crew had gone to work at 7:00 a.m. on November 9, 1991.

The crew of four (4) employees were engaged in shoving 17 rail box cars, attached to the locomotive, east, in the process of placing 2 cars loaded with carbon graphite (coke) at the loading dock on the west side of the melt shop. Mr. Clarence Finley was operating the locomotive and Mr. Charles Schindler

was the switchman positioning the cars at the dock using 2-way radio communications with the locomotive.

According to the Midlothian Police Department, the locomotive operator, Mr. Finley, was moving the cars into position while Mr. Schindler was giving instructions. The final instruction relayed by Mr. Schindler was to tell Mr. Finley to stop. Mr. Finley applied the locomotive brakes and awaited further instructions Mr. Schindler's job once the train was stopped was to uncouple the cars. After a short time, when no further instructions were heard, Mr. Finley attempted to make radio contact with Mr. Schindler. When he received no response, he asked Mr. Bobby Nix, operator, who was riding in the cab of the locomotive, to go check on Mr. Schindler. Mr. Nix left the cab and started to the area. Mr. Claude Garrett, trainee, who was riding on the front of the locomotive, accompanied Mr. Nix. Upon arriving at the loading dock area, Mr. Schindler was found pinned between a rail car and the alloy bin retaining wall. The rail car that had Mr. Schindler pinned was the second car from the east end. Rescue assistance was summoned and Mr. Schindler was freed at 4:52 p.m. by moving the car away from the dock using a porta-power (a large hydraulic jack).

After Mr. Schindler was freed, he was transported by ambulance to Baylor Medical Center in Waxahachie where he passed away at 7:48 p.m. Death was attributed to blunt trauma to upper torso.

Clearance Obstructions at the Accident Site

The distance between the loading dock and the center line of the track is less than the required minimum of 8'6" prescribed by the Texas Clearance law. The east end of the dock is approximately 5'11" from the center line of the track and the west end is approximately 5'8" from the track center line.

The distance between the retaining wall of the holding area for the storage of alloys and the center line of the track is less than the required minimum of 8'6" prescribed by the Texas Clearance Law. The retaining wall at its widest section is approximately 6'8" from the center line of the track. The distance from the base of the wall's steel support braces to the track center line is approximately 5 ' 10 ".

Chaparral's Knowledge of Clearance Law

Chaparral officials stated that they were unaware of the Texas Clearance Law. According to Mr. Victor Swaim, a company official responsible for employee safety, and Mr. Harry Borowczak, General Manager, the dock and the retaining wall were constructed to conform with American Railway Engineer's Association side clearance standards.

There are no signs, lights, reflective tape or other means of advance warning of close side clearance in the area of the dock and the retaining wall. Mr. Swaim stated that working conditions in this area were not viewed as hazardous. Chaparral Steel's General Plant Safety Rules & Information contains a section entitled "Railroad Hazards." There is no mention of hazards to employee safety associated with inadequate clearance between rail cars and obstructions to the side or above railroad tracks.

APPENDIX C

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION/GAS UTILITIES DIVISION

DOCKET NO. 0003699ZZCL DATE ISSUED: FEBRUARY 28, 1995

APPLICATION OF J.L. PROLER IRON & STEEL COMPANY FOR PERMISSION TO DEVIATE FROM THE TERMS OF THE TEXAS CLEARANCE LAW AT 4401 CLINTON DRIVE, HOUSTON, TEXAS 77020.

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas ("the Commission") finds that after statutory notice was given to the public and to all interested parties, and after no protest was filed, the above-styled application was processed on an expedited basis by an examiner who prepared the findings of fact and conclusions of law incorporated in this order. The Commission makes the following findings of fact and conclusions of law in connection with said application:

FINDINGS OF FACT

1. J.L. Proler Iron & Steel Company (the "applicant") operates a scrap metal processing facility at Houston, Texas ("the facility"). The facility ships its product by the Southern Pacific Railroad.

2. The facility has a large custom built machine above a railroad track that is used to crush steel turnings (the "crusher").

3. The crusher was designed to efficiently load steel crushings into a railroad gondola (an open top, low sided rail car) without spillage.

4. The crusher encroaches into the area regulated by the Railroad Commission of Texas under the Texas Clearance Law [Tex. Rev. Civ. Stat. Ann. Art. 6559(a)-(f) Vernon-Supp. 1926]. The distance from the centerline of the track to the crusher is 5'-9". The distance from the top of the rail to the bottom of the crusher is 10'-0".

5. The design and dimensions of the crusher are justified by engineering considerations and operational requirements. The crusher's encroachment into the regulated area is a function of those engineering considerations and operational requirements.

6. The application has not been protested by the United Transportation Union representing railroad switching personnel or any labor organization representing employees within the facility.

CONCLUSIONS Of LAW

1. Tex. Rev. Civ. Stat. Ann. Art. 6559(a)-(f) [Vernon-Supp. 1926] requires that structures and other objects adjacent to or above a railroad track be placed no less than 22 feet above the top of the rails and no less than 8 ½ feet from the center of the track. However, the Commission may permit applicants to deviate from those requirements when good cause has been shown.

2. The Commission concludes, based on the above findings, that good cause has been shown by J.L. Proler Iron & Steel Company for permission to deviate from the dimensional requirements of the Texas Clearance Law at its facility located at Houston, Texas. The Commission also concludes that the

safety of persons at the facility will not be diminished by the granting of the application, provided that proper safety precautions are taken by the applicant. Accordingly, the Commission orders that the application be granted, subject to the following conditions:

(1) Two signs reading "Caution: Reduced Clearances, No person on or in rail car during movement" shall be placed in a conspicuous place adjacent to the railroad track, a reasonable distance from the crusher (one sign at each end of the track).

(2) Signs required by (1) above shall be lighted during nighttime switching operations.

(3) Signs required herein shall not extend into the area regulated by the Texas Clearance Law.

(4) The railroad serving the facility shall be given written notification of the reduced clearances attributable to the encroachments specified herein.

(5) The applicant shall instruct all existing and new employees at its facility concerning safe work practices in conjunction with the movement of rail cars through the crusher.

(6) The applicant shall supervise the movement of the rail cars through the crusher to ensure that no person is riding on or in a rail car, and that no person is standing close enough to the track in the vicinity of the crusher to be caught between the crusher and a moving rail car.

Permission granted to J.L Proler Iron & Steel Company to deviate from the dimensional requirements of the Texas Clearance Law shall not be effective until a notarized statement of compliance has been sent to:

Section Manager
Rail Safety
Transportation/Gas Utilities Division
Railroad Commission of Texas
Capitol Station
P.O. Box 12967
Austin, TX 78711-2967

The Commission will have the right to inspect the facility of J. L. Proler Iron & Steel Company after receiving written notice of compliance stating that the conditions in this Order have been met.

RAILROAD COMMISSION OF TEXAS

/s/ BARRY WILLIAMSON
Chairman

Attest:

/s/ KIM WILLIAMSON
Secretary

/s/ CHARLES R. MATTHEWS
Commissioner

/s/ CAROLE KEETON RYLANDER
Commissioner